STATE OF ALASKA
v.
EARL G. PATTERSON

IBLA 78-427 Decided February 22, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, dismissing an earlier appeal as untimely.

Set aside and remanded.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Effect of -- Rules of Practice: Appeals: Timely Filing

   Timely filing of a notice of appeal with the Board of Land Appeals is jurisdictional. If appeal from a decision of a Bureau of Land Management official is untimely, the Board does not have jurisdiction to consider it and that official must close the case pursuant to 43 CFR 4.411(b). When an appeal is properly filed, the BLM official loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal until jurisdiction over it is restored by Board action disposing of the appeal. Where BLM closes a case because appeal was untimely when in fact it was timely, the Board's jurisdiction will have been triggered at the time of filing of the notice of appeal. BLM's action in closing the case is a nullity and does not affect the appellant's rights before the Board.

2. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Appeals -- Contests and Protests: Generally -- Rules of

Practice: Government Contests -- Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the allotment issued, if all else be regular.

3. Alaska: Native Allotments -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Notice of Appeal

Where, in a decision holding a Native allotment for approval and a State selection for rejection to the extent of a conflict, the Bureau of Land Management grants the State 30 days to initiate a private contest challenging the Native allotment, the 30-day appeal period will commence upon expiration of the 30 days accorded the State for initiation of a private contest and not with receipt of the decision.

4. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Appeals -- Contests and Protests: Generally -- Rules of Practice: Appeals: Generally

Where it appears that a party did not realize that an election of remedies was mandated by Departmental procedures, a decision requiring the initiation of a private contest will be set aside, and the party will

> be permitted a period of time in which to initiate a private contest or alternatively, waive such private contest and pursue a direct appeal on the question of whether a Government contest should issue.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, State of Alaska, for State of Alaska; Robert A. Breeze, Esq., Rose and Breeze, Anchorage, Alaska, for Earl G. Patterson.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing its appeal of an earlier decision as untimely.

On November 29, 1977, BLM issued a decision holding the Native allotment application of Earl G. Patterson, AA-5696, for approval and rejecting in part the State of Alaska's selection application A-053268, to the extent that it conflicted with the Native allotment. 1/ BLM allowed the State 30 days from receipt of the decision to initiate a private contest pursuant to 43 CFR 4.450 challenging the applicant's compliance with the use and occupancy provisions of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). The decision stated that failure to initiate a private contest would "result in the Native allotment being approved and the State selection being rejected" to the extent of any conflict and that "[t]his action will become final without further notice." The BLM decision also indicated that the State had the right to appeal to the Board of Land Appeals in accordance with Departmental regulations, 43 CFR 4.400.

The State interpreted the BLM decision to mean that it had 30 days to initiate a private contest, and, if it did not, the decision would then become final triggering a 30-day appeal period as provided by the regulations. The State received the BLM decision on January 5, 1978. BLM received the State's notice of appeal from that decision on March 7, 1978. In a notice dated March 13, 1978, BLM informed the State that its appeal was untimely and would not be considered. The notice indicated that the 30-day appeal period had run simultaneously with the 30-day period of contest and had expired on February 6, 1978.

1/ The Native allotment application was filed pursuant to the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)). The State selections were made pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Chap. 2 (1976).

In an appeal received by BLM on May 11, 1978, the State has challenged BLM's refusal to accept its earlier appeal. The State argues that the appeal procedure set forth in 43 CFR 4.411 is "highly unorthodox" in that the initial decisionmaker, BLM, may decide whether an appeal from its decision may be considered. The State further contends that the 30-day appeal period ran from the date that the original decision became final following the period for initiating contest.

Native allotment applicant, Earl Patterson, argues in response that the State's appeal of the BLM dismissal of the prior appeal as untimely was itself not timely. In addition, he contends that the Department is free to promulgate any reasonable regulations necessary to conduct its business and that BLM has correctly construed the regulations governing appeal procedure.

[1] We have consistently held that the timely filing of a notice of appeal is necessary for the Board to take jurisdiction. Lavonne E. Grewell, 23 IBLA 190 (1976); Elbert F. Howey, 15 IBLA 208 (1974). The rule is strictly applied. If a notice of appeal is untimely, the Board does not have jurisdiction to consider it and it must be dismissed. At the same time, it is well-established that when an appeal from a decision of a BLM official is properly filed that official loses jurisdiction over the case and has no further authority to take any action on the case until jurisdiction over it is restored by Board action disposing of the appeal. Any adjudicative action taken by BLM relating to the subject matter of the appeal, after a timely appeal is filed, is a nullity since BLM will have acted without jurisdiction. Warren D. Elmore, 42 IBLA 91 (1979); Utah Power & Light Co., 14 IBLA 372 (1974). See Audrey I. Cutting, 66 I.D. 348, 351-52 (1959).

Departmental procedures found in 43 CFR 4.411(b) do not detract from these principles. They simply eliminate the need for review by this Board and the concomitant delay before a final decision is reached in a situation where the outcome is mandated by the regulation. Where appeal is untimely, it must be dismissed. The regulations direct the method for closing the case: "[T]he case will be closed by the officer from whose decision the appeal is taken." The Board, however, still retains the exclusive power to decide who may or may not appeal to it. State of Alaska, 42 IBLA 94, n.4 (1979). See generally Fancher Brothers, 33 IBLA 262, 264-65 (1978); BLM Manual 1841.15. If BLM should close a case on the grounds that an appeal was untimely filed when in fact it was timely, the Board's jurisdiction will have been triggered at the time of filing regardless of the BLM action. That action is a nullity and does not affect the appellant's rights before the Board. We may thereafter consider the appeal on its merits.

Earl Patterson urges that we dismiss the State's present appeal also as untimely. He argues that the BLM notice dismissing the State's appeal as untimely was itself a decision form which appeal may

be taken and therefore the State had only 30 days in which to appeal. BLM received the State's appeal some 58 days after the State received the dismissal decision. However, as we have noted, a finding that an appeal was timely filed, even though erroneously dismissed, means that the Board's jurisdiction over the case arose when the notice of appeal was filed. As we shall discuss, the initial appeal in this case was timely. Although the State must raise the improper dismissal within a reasonable period of time, the mandatory appeal period for invoking the Board's jurisdiction does not apply.

[2] In recent decisions of the Board we have examined the BLM procedures for resolution of conflicts between Native allotment applications and State selection applications and set forth guidelines for appellate review by the Board. Specifically, in State of Alaska, 41 IBLA 309 (1979), we said that where such a conflict exists and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. The State may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings during the time prescribed to prove lack of qualifications on the part of the Native. If the State elects not to do so, it may inform BLM or simply allow the time to lapse, whereupon BLM will issue a decision concluding the adjudication. The State may appeal that decision to this Board in accordance with 43 CFR 4.400. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If it finds the allotment application acceptable, it will order the allotment issued if all else be regular.

[3] The Board has reviewed numerous cases where the BLM notice 2/ granted 30 days for initiation of a private contest and specified a right to appeal to this Board. Where the State of Alaska filed notice of appeal after the running of 30 days but within the succeeding 30-day period, BLM, as it did in this case, dismissed the appeals as untimely. In State of Alaska, 42 IBLA 94 (1979), we held that such dismissal was in error. The 30-day appeal period commenced upon expiration of the 30 days allowed the State for initiation of a private contest and not with the receipt of the BLM notice. Accordingly, the State's notice of appeal was timely filed.

[4] The appeal in this case was filed prior to the issuance of the decision in State of Alaska, 41 IBLA 309 (1979), wherein the Board

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2/ In this case the initial determination holding the Native allotment for approval and rejecting in part the State selection was captioned "Decision" rather than "Notice." We wish to note that it is the substance of the determination not the caption which is critical here. Earl Patterson's attempt to distinguish the present case from State of Alaska, 41 IBLA 309 (1979), on that basis is without merit.

delineated the election of remedies which the State must make and therefore the State was unaware that an election as mandatory. Accordingly, we will set aside the original decision and afford the State a period of 35 days from receipt of this decision in which to file a private contest complaint. At the expiration of 35 days, the decision of BLM will become final and State may take a timely appeal to the Board directed solely to the question of whether a Government contest complaint should issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge